SUPREME COURT, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1998

JOSEPH NOWAK,

Petitioner,

v.

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

On Petition for Writ of Certiorari
To The Florida Supreme Court,
Fourth District Court of Appeal of Florida
Circuit Court of Palm Beach County, Florida

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

Joseph Nowak
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25 pp

APPENDIX TABLE
OF CONTENTS

Page no.

DECISION OF STATE A-1
COURT OF APPEALS

DECISION OF STATE . . . B-1
TRIAL COURT to B-11

DECISION OF STATE
SUPREME COURT C-1

INSTRUCTIONS BY
STATE JUDGE TO JURY
TO DISREGARD THE EVIDENCE .D-1
To D-8

APPENDIX TABLE OF CITATIONS

CASE LAW	PAGE NO.
Ayers v. Wal-Mart Stores. Inc., 941 F.Supp. 1163 (M.D. Fla. 1996) .	B-10
Breedlove v. Singletary, 595 So. 2d 8 (Fla 1992).	C-1
Coutu v. Martin County Board of County Comm. 47 F.3d 1068 (11th Cir. 1995).	B-3, 4
Dey v. Colt Const. and Development,28 F. 3d 1446 (7th Cir. 1996). .	B-3
Dollis v. Rubin, 77 F. 3d 777 (5th Cir. 1995)	B-6
Mattern V. Eastman Kodak Company, 104 F. 3d 702 (5th Cir.1997)	B-6
McCabe v. C.E. Sharrett. Jr., 12 F. 3rd 1558, (11th Cir. 1994)	B-8
Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990)	C-1
Rogers v. Miller, 57 F. 3rd 986 (11th Cir. 1995). .	B-8
Smart v. Ball State University, 89 F.3d 437 (7th Cir. 1996)	B-7, 9
Wu v. Thomas, 996 F. 2d 227 (11th Cir. 1993) .	B-8

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1998

JOSEPH NOWAK,
Appellant,

v.

SCHOOL BOARD OF PALM BEACH COUNTY,
Appellee.

CASE NO'S. 97-2315 and 97-3900

Decision filed August 5, 1998

Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jack H. Cook, Judge; L.T. Case No. CL 94-4205 AJ.

William Riker, Esq., North Palm Beach, for appellant

Phillip D. Parrish, Esq., Stephens, Lynn, Rein McNicholas, P. A., Miami, for appellee.

PER CURIAM.
AFFIRMED.

POLEN, TAYLOR, JJ., and FRUSCIANTE, JOHN A., Associate Judge, concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

APPENDIX A

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR
PALM BEACH COUNTY

JOSEPH NOWAK,
Plaintiff,

vs. CASE NO.: CL-94-4205 "AJ"

SCHOOL BOARD OF
PALM BEACH COUNTY,

Defendant.
_____/

**FINAL JUDGMENT AND ORDER
DIRECTING VERDICT
FOR THE DEFENDANT**

This matter was tried before a jury during the two week period between May 20 and June 2, 1997. At the close of all of the evidence, the Defendant, School Board of Palm Beach County, moved for a directed verdict on all of the Plaintiff's claims for sex discrimination, constructive discharge and retaliation in violation of Florida Statutes §760.10, the Florida Civil Rights Act. I reserved ruling on the motion and submitted the case to the jury, which ultimately found no liability as to the claims for sex discrimination and retaliatory discharge, but awarded damages of $102,668.00 on the claim for retaliation. For the

reasons set forth below, I now grant the Defendant's Motion ForDirected Verdict and enter a Final Judgment for the Defendant as to all claims.

In considering the motion for directed verdict, I am mindful that it is not my job to sit as a super juror and to replace the jury's findings of fact with my own. The question on this motion is whether considering the evidence in the light most favorable to the Plaintiff, it is sufficient to support a verdict for the Plaintiff. I find that it is not. The Florida Civil Rights Act is of relatively recent origin and the case law construing it is sparse. But, the act is patterned after the Federal law (Title VII) and accordingly, Federal cases are instructive. Those cases are consistent that to prove a claim for retaliation, the Plaintiff must prove the following three elements. First, that he engaged in some activity protected under the act; second, that an adverse employment activity occurred with reference to him and; third, that there is a causal link between his protected activity and

the adverse employment action. In the Eleventh Circuit Court of Appeal, this causal link has been found to mean that the Plaintiff must only establish that protected activity and the adverse employment action are not completely unrelated, Coutu v. Martin County Board of County Commissioners, 47 F.3d 1068 (11th Cir. 1995)

Under Federal law, if the Plaintiff sets forth a prima facie case of retaliation, then the burden shifts to the employer to provide a legitimate non-retaliatory reason for the employment action, at which time the Plaintiff must then prove by a preponderance of the evidence that the non-retaliatory reasons are a mere pretext for the otherwise prohibited act, see Dey v. Colt Construction and Development, 28 F.3d 1446 (7th Cir. 1996).

In this case, I find that while the Plaintiff proved he engaged in a protected activity, he failed to present any evidence of an adverse employment action or that any action taken by the Defendant did not have a legitimate non-retaliatory

purpose and was only a pretext for prohibited retaliatory action.

The protected activity engaged in by Mr. Nowak was his complaints alleging a gender-based hostile work environment at the Wellington High School. These complaints were made to both the principal at the high school, Mona Jensen, and the Superintendent of the Palm Beach County School Board, Monica Ulhorn, in the summer and fall of 1993. While the jury concluded that there was no hostile work environment, a decision supported by the overwhelming weight of the evidence, it is not necessary that the Plaintiff's complaint be factually accurate. It is sufficient if the complaint is made in good faith, see Coutu, Supra, at 1074. The evidence supports the proposition that however wrong-headed Mr. Nowak's perceptions of a hostile work environment might have been, they were nevertheless made in good faith.

I find however that the Plaintiff has failed to establish any evidence of an adverse employment action taken against him by

the School Board of Palm Beach County. The jury was not asked to state the acts which they found retaliatory. But, when asked to specify the retaliatory acts directed toward Mr. Nowak, his counsel enumerated the following:

1. He was evaluated three or four times during the school year of 1993-1994, when most teachers are only evaluated once per school year;
2. Four of his students were interviewed following parental complaints that he demeaned students in class and gave them tests over material without allowing adequate time for it to be read and without conducting a review of the material;
3. He received one failing markout of sixteen on an evaluation in 1994;
4. He did not receive notice of English Department meetings;
5. There was no investigation of the complaints of sexual discrimination within the English Department;
6. He received a letter from Principal Jensen asking him to turn in his lesson plans and stating that failure to do so would constitute gross insubordination;
7. Someone said he didn't like Shakespear; (sic)
8. He was transferred to Spanish River High School in

1996. Neither party introduced into evidence either Mr. Nowak's letter of resignation or the letter reassigning him to Spanish River High. But, Mrs. Nowak testified that she and Mr. Nowak planned to start their new business in the summer of 1996 and that by July of that year, they knew they were not returning to the teaching profession. This was before the reassignment.
I find that as a matter of law none of these acts or any other act contained in the evidence constitutes an adverse employment action. The Federal Circuit Courts of Appeal are not consistent in their definition of an adverse employment action. In the Fifth Circuit for instance, the court has held Title VII was designed to address ultimate employment decisions and not to address every decision made by employers that arguably might have some tangential affect upon such decisions, see Mattern V. Eastman Kodak Company, 104 F.3d 702 (5th Cir.1997) and Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995). In Mattern, the Fifth Circuit noted that an ultimate employment decision includes acts "such as hiring, granting leave, discharging, promoting and compensating.", at 782. But, that "hostility from fellow

employees, having tools stolen and resulting anxiety, without more do not constitute ultimate employment decisions and therefore, are not the required adverse employment actions", at 715.

Courts such as the Seventh Circuit have a broader concept of adverse employment action. In Smart v. Ball State University, 89 F.3d 437, at 441 (7th Cir. 1996), the Court did not define adverse employment actions, but observed that even using a broad definition of adverse employment action, it still does not include everything that makes the employee unhappy and does not extend to Otherwise minor and trivial employment actions that an irritable, chip-on-the shoulder employee did not like . . .'" Thus, it does not include claimed humiliation caused by the creation of a co-principal position; a lateral transfer with accompanying bruised ego; or an undeservedly poor evaluation, Smart, at 441.

The Eleventh Circuit has not specifically defined "adverse

employment action,' in the context of Title VII, see Wu v. Thomas, 996 F.2d 271, 274 (11th Cir. 1993). However, in that case the Court observed at 273:

> "But plaintiffs do not cite and we do not find any case that clearly establishes that retaliatory harassment - as opposed to sexual or racial harassment - could violate Article VII where the employer caused the employee no tangible harm such as loss of salary, benefits or position. . . ."

In the context of section 1983 actions, the Eleventh Circuit has broadly defined "adverse employment action" to include not only discharges but also refusals to hire, refusals to promote, and reprimands, McCabe v. C.E. Sharrett. Jr., 12 F.3rd 1558, 1563 (11th Cir. 1994) and Rogers v. Miller, 57 F.3rd 986, 992 (11th Cir. 1995).

I find that none of the actions complained of by the Plaintiff or any combination of those actions constituted an adverse employment action on the part of the Defendant. This is true whether the more restrictive definition employed by the

Fifth Circuit is applied or the broader definitions employed by the Seventh and Eleventh Circuits. While the actions of the Defendant's administrators and supervisors appeared to make Mr. Nowak unhappy, they caused him no tangible harm. He suffered no loss of salary, benefit or position and received no reprimand. The matters complained of fall into that category of acts referred to by the Seventh Circuit in Smart v. Ball State, supra, at 441, as "minor or trivial employment actions that 'an irritable, chip-on-the shoulder employee did not like. "

Moreover, even if some of this activity could be characterized as adverse employment activity, the Plaintiff failed to present any proof that it was taken as a pretext for retaliation as opposed to for legitimate purposes as outlined by the School Board. The first three complaints resulted from semester exams where 51% of Mr. Nowak's students in all of his classes received an "F" and another 26` received a "D" grade. During this same year, parents were complaining that Mr. Nowak

was berating students in class. It would have of duty for the Defendant's administrators not scrutinize Mr. Nowak and to investigate how he classes. Complaints 4 through 7, as set forth trivial as to be inconsequential and complaint been a dereliction to closely was conducting his above, are so number 8 is both remote in time (three years after the protected activity) and unconnected to the protected activity by anything other than speculation and conjecture.

The Defendant also alleges that the Plaintiff's claim is barred by his failure to comply with the administrative remedies provision of Florida Statutes §760.11. Although no Florida State Appellate Court has addressed this question, I find the reasoning in Ayers v. Wal-Mart Stores. Inc., 941 F. Supp. 1163 (M.D. Fla. 1996), persuasive and find that the Plaintiff's failure to proceed as set forth in Florida Statutes §760.11, also requires that a verdict be directed in the Defendant's favor.

Accordingly, for the reasons set forth above, I grant the

Defendant's Motion For Directed Verdict on the claim for retaliation and it is Ordered and Adjudged that the Plaintiff shall take nothing from this action.

I reserve jurisdiction to consider the question of costs and attorney's fees at a later date.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, on this 6TH day of June, 1997.

S/_____
JACK COOK
CIRCUIT COURT JUDGE

Copies furnished:

William Riker, Esq., Suite 104, 321 Northlake Blvd., North Palm Beach, Florida 33408

Edward Polk, Esq., 2 Datran Center, 9130 S. Dadeland Blvd., PH 1 & 2, Miami, Florida 33156

Supreme Court of Florida

TUESDAY, DECEMBER 8, 1998

JOSEPH NOWAK,

Petitioner,

v. CASE NO. 94,008

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

Respondent.

* * * * * * *

ORDER DENYING PETITION

The petition for writ of mandamus/certiorari is hereby denied as procedurally barred. Extraordinary remedies are not a second appeal and cannot be used to litigate or relitigate issues which could have been or actually were raised on direct appeal. See Breedlove v. Singletary, 595 So. 2d 8, 10 (Flat 1992); Mills v. Dugger, 574 So. 2d 63, 65 (Flat 1990).

OVERTON, SHAW, WELLS, ANSTEAD and PARIENTE, JJ., concur.

APPENDIX C-1

A True Copy
TEST:
Sid J. W Supreme Court

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preme Court

(clerk S FLORIDA

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cc:
Mr. William Riker
Mr. Philip D. Parrish
Hon. Jack H. Cook, Judge
Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Barry J. Stone, Chief Judge

APPENDIX C-2

IN THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH
COUNTY, FLORIDA

JOSEPH NOWAK,
Appellant, Plaintiff

vs. No. 94-4205 AJ

SCHOOL BOARD OF PALM BEACH
COUNTY, FLORIDA,

Appellee, Defendant.

Thereupon, the above-styled cause came on for Jury Trial in the 15th Judicial Circuit, in and for Palm Beach County, Florida, commencing on May 19, 1997.

VOLUME VIII

APPENDIX D-1

TRIAL EXCERPT

* * * * * * * * * * *

THE COURT: At this time, Ladies and Gentlemen, you may proceed with your deliberations.

JUROR NUMBER 3: You gave us an instruction yesterday morning. I would like you to repeat the instruction.

THE COURT: That I have removed from your consideration -- I had removed from your consideration anything dealing with assignment of classrooms or assignment of classes.

Okay. Okay. Thank you, Ladies and Gentlemen. You may proceed with your deliberations.

Thereupon, the jury panel (enters the jury room at 2:44 p.m.)

THE COURT: Counsel, would you all come up at this time before you send the exhibits back. And let's go through these and make sure everything that needs to go back goes back, and anything that doesn't need to go doesn't go back.

Any objection as read other than what we

talked about?

MR. POLK: Not as to what was read. The Court didn't mention field trips.

THE COURT: That was the other item.

MR. RIKER: I feel it was -

THE COURT: Assignment of classrooms.

MR. RIKER: Your Honor, I feel again that instruction can be misleading to the jury, because - -

THE COURT: Mr. Riker, I've already given it once. At this point I have to give it. Bring them back in, Mr. Brooks.

MR. RIKER: Your Honor, may I just indicate as far as disparage treatment, but not with respect to hostile.

MR. POLK: Disparage treatment.

MR. RIKER: Please identify that.

THE COURT: The last one.

MR. POLK: Field trips.

THE COURT: Mr. Riker, there was no - my ruling was and is: There is no testimony in

this case from which a reasonable jury can conclude that the assignment of classes or classrooms had anything to do with Mr. Nowak's gender and disparage treatment or anything else. That's the ruling.

MR. RIKER: I didn't understand that.

THE COURT: And the same with the one field trip incident. Now, the only thing that field trip incident had to do with was actually the field trip. Really I think I removed that completely, did I not?

MR. RIKER: Your Honor, with regard to his gender, but not with regard to retaliation and his gender.

THE COURT: There was nothing in here that indicated that that field trip had anything to do with retaliation against Mr. Nowak, Mr. Riker. Zippo. No evidence.

(Thereupon, the jury panel enters the courtroom at 2:46 p.m.)

THE COURT: When you asked me that, I forgot there was one other item that I had mentioned to you. And I think that was also the field trip issue. Okay. Classroom assignments, class assignments and field trip. Okay. All

PUBLISHER'S NOTE

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right. You may proceed with your deliberations.

(Thereupon, the jury panel enters the jury room at 2:47 p.m.)

THE COURT: Okay. Counsel, if you will come up and go through the exhibits and we can get them back there.

(Thereupon, court is in recess from 2:48 p.m. until until 5:05 p.m.)

THE COURT: Okay. Apparently, Mr. Brooks says the jury would like to recess for the evening and come back on Monday and finish it up. We are going to go ahead and do that. Bring in the jury, Mr. Brooks, and we'll send them out.

(Thereupon, the jury panel enters the courtroom at 5:06 p.m.)

THE COURT: Ladies and gentlemen, I understand you would like to go ahead and recess for the weekend and come back Monday morning to proceed. So we'll go ahead and do that.

If you want to come back earlier than 9:30 even, though, I'll be in hearings, there's no reason that you can't begin your deliberations. You can come back whenever you want to.

JUROR NUMBER 5: 9 o'clock.

THE COURT: Do you want to come back at 9:30?

JURY PANEL: 9:00 sounds good.

THE COURT: 9:00. Okay. If you will just meet Mr. Brooks downstairs then at about 5 to 9:00. Something like that. He'll meet you down there and bring you up here and put you in the jury room.

Now, you've been charged. And, of course, you have the case under consideration. So please be scrupulous about not discussing the case among yourselves or with anyone else during this recess. All jury deliberations must take place in the jury room so that everyone is present. So when you're going to the cars this evening you can talk about anything you want to except the case. And the same for Monday when you gather downstairs. And what will happen, I'll have Mr. Brooks up here. And he'll put you in the jury room

And he will come and let me know. I will take a short recess from my hearings at that time.

And we'll put on the record that all are here and the deliberations have continued.

But I don't really see any need to

bring you back out. He'll just put you in there. And he'll let me know and I'm put that on the record. Thank you very much for your service so far. You're excused for the weekend. We'll see you here on Monday morning at 9 o'clock.

Counsel, you all just may want to just be here or have someone present about 9 o'clock so we'll put on the record that the jury is deliberating at that time.

MR. RIKER: Yes, Your Honor.

THE COURT: We'll be in recess. (Thereupon, court is in recess at 5:10 p.m. and scheduled to resume on Monday, June 2nd, 1997 at 9:00 a.m.)

COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, KIMBERLEY A. ROSS, a Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the excerpt trial transcript is a true and complete record of my stenographic notes.

Dated this 8th day of August, 1997

S/KIMBERLY A. ROSS

KIMBERLEY A. ROSS
MY COMMISSION t CC 522345
MY COMMISSION EXPIRES: JANUARY 27, 2000

PROOF AND CERTIFICATE OF SERVICE

I, Joseph Nowak, do swear or declare that on this date, ~~February~~ March 3, 1999, as required by Supreme Court Rule 29, I have served three (3) copies of the MOTION FOR LEAVE TO FILE, the proposed PETITION, and the foregoing APPENDIX upon each party to the above proceeding by mailing to that party's counsel, by depositing an envelope containing the above documents in the United States mail properly addressed to them and with first-class postage, certified mail, return receipt requested #P131 333 476, prepaid.
The names and addresses of those served are as follows:

Philip Parrish, Esq.
Attorney For Respondent
9130 S. Dadeland Blvd.
Phone number 800 329 2911
Two Datran Center, PH 2
Miami, Fl 33156

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 26, 1999.

Joseph Nowak

Joseph Nowak

3101 Canal Drive

Boynton Beach, Fl 33435

561

736 2715

STATE OF FLORIDA
COUNTY OF PALM BEACH

Before me the undersigned authority personally appeared Joseph Nowak, who is personally known to me or was identified by Drivers License, and upon oath, he states he foregoing is true and correct and that he signed his name to evince same on this 26 day of February, 1999.

Signature Christine A Thompto
printed name _____
(seal) Notary Public
State of Florida

CHRISTINE A. THOMPTO
MY COMMISSION # CC 690678
EXPIRES: October 22, 2001
Bonded Thru Notary Public Underwriters